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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 41

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BERGEN COUNTY, NEW JERSEY, ROCKLAND COUNTY, NEW YORK, the NEW JERSEY MUNICIPALITIES OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD, RIDGEFIELD PARK, TEANECK and WEEHAWKEN, the CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and ROBERT J. KILPATRICK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF ON BEHALF OF THE NEW YORK CENTRAL RAILROAD COMPANY, APPELLANT, IN OPPOSITION TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 838

THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellant,

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BERGEN COUNTY, NEW JERSEY, ROCKLAND COUNTY, NEW YORK, the NEW JERSEY MUNICIPALITIES OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD, RIDGEFIELD PARK, TEANECK and WEEHAWKEN, the CITIZENS UNITED TRANSIT COMMITTEE, an unincorporated association, BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and ROBERT J. KILPATRICK,

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Appellees' arguments in support of their motion to affirm (received by us on April 4, 1958) are diffuse and, in large part, do not face up to the jurisdictional issue raised on this appeal. Except as supplemented

below, we stand on our jurisdictional statement heretofore filed.

1. **Appellees' reliance on the "partial discontinuance" cases is misplaced because those decisions are not inconsistent with appellant's contentions.** Not a single authority is cited by the appellees which supports the holding of the Court below that complete cessation of operation of each of appellant's two passenger ferry lines would not be an abandonment of a line of railroad, or a portion thereof, within the scope of Section 1(18) of the Interstate Commerce Act.

The authorities cited or referred to by appellees in this connection are all holdings that, under Section 1(18), the Interstate Commerce Commission will not take jurisdiction of a mere partial discontinuance of the service over a line. In their reliance on these "partial discontinuance" cases, the appellees simply beg the question (as did the District Court). The appellees (pp. 3-6) seem to assume that the Railroad is contending that the Commission would have jurisdiction over a partial discontinuance of service; then they proceed to answer such a contention although the Railroad has not made it. This process of fashioning a straw man for the pleasure of destroying him may be satisfying to its authors but it does not deal with the question at bar.

We neither make here, nor made below, any contention that the Commission would have jurisdiction in this proceeding if the Railroad's application were found to involve only a partial discontinuance of service over a line. On the contrary, what we urge is that complete cessation of operation of appellant's pas-

senger ferry lines is not a mere partial discontinuance of service but is an abandonment within Section 1(18), as the Interstate Commerce Commission found.* Thus, there is no substance to appellees' claim (p. 18) that these "partial discontinuance" decisions are inconsistent with appellant's contentions in this case.

2. **Appellees' criticisms of the Commission's trans-Hudson ferry abandonment decisions are without merit.** The appellees (pp. 6-9) criticize the series of Interstate Commerce Commission trans-Hudson ferry abandonment decisions dating back to 1941, stating that they do not reflect a "well-considered" or "long-established" administrative interpretation and that in the first two such decisions the Commission "exercised jurisdiction somewhat absent-mindedly".

These criticisms represent mere wishful thinking on the part of the appellees. Certainly, the exercise of jurisdiction by the Commission in a series of cases running back to 1941 is "long-established".** Nor are

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* While the Commission might well have held in the first of its "partial discontinuance" decisions (*Public Convenience Application of K.C.S. Ry.*, 94 I.C.C. 691 (1925)) that Section 1(18) did give it jurisdiction over a partial abandonment of operations, it nevertheless decided to the contrary and has since followed that decision in a number of other cases. This Court, while it has not decided the issue, has cited these Commission decisions in a manner which indicated its approval of them. The Railroad has not challenged this line of Commission decisions but contends that this appeal involves an abandonment to which these decisions have no application.

** In addition to this series of trans-Hudson ferry cases, the Commission, in a number of cases since 1922, has exercised jurisdiction under Section 1(18) over ferry line abandonments in various other parts of the country. The first such case appears to be *Abandonment of Ferry by C. & O. Ry.*, 71 I.C.C. 450 (1922), where the Commission authorized abandonment of a railroad's ferry line which carried passengers and vehicles only, with "freight traffic being handled through other connections." In later pre-1941 cases,

the appellees entitled to refer to these trans-Hudson ferry decisions as not "well-considered" or as "absent-minded".

In the first two such cases, no one questioned the Commission's jurisdiction. When it came to the third such decision, in 1946 (*Hoboken Ferry Company et al. Abandonment*, 267 I.C.C. 51), the appellees' own brief (pp. 7-8) shows that the applicant railroad itself had questioned the Commission's jurisdiction. The Commission in its opinion in that case (pp. 52-3) discussed the issue and specifically included in the discussion the two earlier cases. Therefore, as early as 1946, the question of jurisdiction involved in the first three of these cases was "well-considered" by the Commission, unless the appellees are using that term merely to mean that they do not agree with the result; and the Commission again gave the issue detailed and careful consideration in the present proceeding.

In the light of the 1946 Commission opinion, it is also difficult to understand the appellees' further statement (p. 6) that the jurisdiction of the Commission was not "challenged" in these trans-Hudson ferry cases, unless their point is only that the jurisdictional question was raised in 1946 by the applicant railroad rather than its opponents. If that is their point, it is obviously without significance. No matter who

the Commission has similarly authorized abandonments of ferry lines which carried passengers and vehicles, but no freight (*e. g., Abandonment of Ferry by New York, N. H. & H. R. R.*, 159 I.C.C. 413 (1929)). Jurisdictional objections were considered and rejected by the Commission in some of these earlier ferry abandonment cases (*e. g., Delaware River Ferry Co. of New Jersey Abandonment*, 212 I.C.C. 580 (1936)). The series of trans-Hudson ferry cases cited in our jurisdictional statement (p. 20) are so squarely in point here that it seems to us unnecessary for present purposes to do more than mention these earlier ferry abandonment cases.

raised it, the jurisdictional question was raised before the Commission at least by 1946 and the Commission expressly held that its jurisdiction was "clear" (267 I.C.C., at p. 53).

3. **Appellees' franchise contention is irrelevant on this appeal.** Appellees' reliance (p. 10) on the District Court's statement that there was a "single franchise * * * for a unified passenger and freight service" is likewise misplaced.

Where an abandonment under Section 1(18) of the Interstate Commerce Act is involved, a state franchise obviously cannot limit the Federal commerce power to regulate such abandonment (*Colorado* v. *United States*, 271 U. S. 153, 165 (1926)).

4. **The statutory definition of "railroads" to include "ferries" is not meaningless, as appellees contend; it is clear, and is controlling in this case.** The appellees seem to say (pp. 10-11) that the statutory definition of "railroad" to include "ferries" has no significance here.

Their argument is that a "ferry" is merely a "boat" and is therefore not a line, or a portion of a line, of railroad. However, when one substitutes in Section 1(18) the word "ferry" for the word "railroad" the reference is to a "line of ferry" (or, more simply, a ferry line); and if one includes "ferry" with "railroad" in Section 1(18), the reference is to a line of railroad, including a ferry line.* While the appellees argue (p. 8) that the Commission's jurisdiction was

* In *Delaware River Ferry Co. of New Jersey Abandonment*, 212 I.C.C. 580 (1936), a similar jurisdictional objection which sought to nullify the effect of the Section 1(3)(a) definition of "railroads" to include "ferries" was rejected by the Commission.

not challenged in *Board of Public Utility Com'rs of N. J.* v. *United States*, 132 F. Supp. 379 (3-Judge Court, D. N. J. 1955), there can be no question but that the Court in that case held squarely that Section 1(18) does cover a ferry line. The Court after quoting the Section 1(3)(a) definition, proceeded to rule that the Commission had jurisdiction, saying (p. 381):

> "Since Hoboken is a ferry owned by the Railroad carrier and operated in conjunction with it for continuous carriage, it was necessary and proper for application to be made to the Commission under 49 U. S. C. A. § 1(18) for a certificate authorizing abandonment of ferry operations."

Also in point is *New York Central R.R.* v. *Hudson County*, 227 U. S. 248 (1913). In that opinion, this Court quoted the equivalent definition in the Interstate Commerce Act as it then read, namely, "the term railroad as used in this act shall include all bridges and ferries used or operated in connection with any railroad * * *" and went on to hold (pp. 263-4) that the effect of this definition was not merely to bring *ferry boats* as such under the Act but was to place regulation *of the interstate commerce carried on by the ferry boats* exclusively within the Federal domain.

5. **Appellees' synthetic quotation.** Appellees unsuccessfully seek (pp. 16-17) to analogize the "line of railroad" issue here involved to a case which related to whether a dressed chicken was a "manufactured" commodity.

In this connection, we wish only to emphasize that the quotation at the bottom of page 16 and at the top of page 17 of appellees' brief is the appellees' version

of what they think the District Court below *might* have said about the chicken case if the case had been discussed in the Court's opinion, but that it is *not* a quotation of anything the District Court did say. We think that the appellees do not intend to create any different impression by their purported quotation, but we believe they have not made it clear enough that the language they quote is their own.

6. **Failure of the District Court to give any weight to the Commission's administrative interpretation was clear error.** The appellees argue (pp. 15-18) that only limited weight should be given to the Commission's interpretation of the language of Section 1(18) as applied to the facts of record.

However, even this discussion in the appellees' brief demonstrates that the District Court erred in giving no weight to the Commission's jurisdictional findings.

The appellees concede (p. 19) that the correctness of the Commission's findings of fact in the present case was not questioned by the District Court. Surely the issue of whether there is to be an "abandonment" within Section 1(18) is as much an issue of fact as of law, on which the Commission's expert opinion, applied in a series of cases over the years, is entitled to substantial weight.

The appellees, in discussing (p. 17) *Yonkers* v. *United States*, 320 U. S. 685 (1944), ignore the fact that this Court by that decision sent the case back to the Interstate Commerce Commission in order that it make express jurisdictional findings. After such findings, the matter came back to the 3-Judge District Court which sustained those Commission findings, holding that they were entitled "to at least prima

facie weight" under this Court's decision (*Public Service Com'n of New York* v. *United States*, 56 F. Supp. 351, 353 (S. D. N. Y. 1944)). This Court thereupon affirmed the District Court's decision (323 U. S. 675 (1944)). Under these decisions, the District Court's refusal in the present case to give any weight to the Commission's jurisdictional findings was clearly erroneous.

Conclusion

In the jurisdictional statement, we believe it is demonstrated that the questions presented on this appeal are substantial and that their correct resolution is of urgent importance to the appellant and to the other railroads directly concerned, and also is of national importance because of the legal principles involved and the far-reaching effects of the decision below. In the meantime, during the pendency of this appeal, the Railroad is operating its passenger ferry lines at an out-of-pocket loss of over $100,000 a month (jurisdictional statement, p. B-39).

The motion to affirm should be denied and the Court should note probable jurisdiction.

Respectfully submitted,

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